Supreme Court, U. S.
FILED
DEC 1 1975
MICHAEL RODAK, JR., CLERK

No. 75-439

IN THE

Supreme Court of the United States

HAROLD MICHAEL McSPADDEN
Petitioner,

v.

STATE OF OHIO
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE STATE OF OHIO IN OPPOSITION

HARRY FRIBERG, Prosecuting Attorney
Lucas County, Ohio

By: Charles J. Doneghy, and
Melvin L. Resnick
Assistant Prosecuting Attorneys
Lucas County Court House
Toledo, Ohio 43624

ON BEHALF OF RESPONDENT

TABLE OF CONTENTS

Page

Table of Authorities i

Question Presented:

Is there a violation of the Fourth Amendment to the United States Constitution, if the facts surrounding a warrantless search of baggage and seizure of evidence discovered therein, indicate that the search in question was instigated by private individuals, for private purposes, and that at the request of the private persons, there was minimal police participation in opening the locks of the baggage, with no intent of gathering evidence to be used in a criminal prosecution or otherwise evading constitutional protections, the baggage itself being opened by the private persons disclosing in "plain view" the evidence that was seized by the police officers who had a right to be present 1

Reasons for Denying this Writ 2-5

Conclusion 6

REASONS FOR DENYING THE WRIT

Petitioner's basic premise for urging this Court to grant the Writ of Certiorari is for the purpose of updating the doctrine set forth in *Burdeau v. McDowell*, 256 U.S. 465, to the end that a "very simple rule" would result that would apply in all cases in which the issue of private search and police participation arose. This position is absurd for the reason that the doctrine in *Burdeau, supra*, has been updated in numerous cases since the date of that decision. To urge that one "simple rule" could conceivably be developed that would apply in all circumstances without resort to the unique facts of each case as petitioner urges on page 9 of his brief, is totally without merit. Petitioner there (on page 9 of his brief) is apparently urging that the rule should be developed that a warrant should be required in all cases in which there is any amount of police participation with a private person, and that the warrant requirements could be met by utilizing the information from the private source to satisfy the probable cause requirement. Petitioner then states that otherwise ". . . the police by artifice and working through private citizens, can avoid the requirements of the Fourth Amendment".

Upon but a cursory reflection, this statement is seen to be without merit. There have been many case decisions in which the police have attempted to use private citizens in order to evade search requirements, and in those cases, the Court's have consistently suppressed any and all evidence seized. The plain fact is that in the instant case, there was no such use of private citizens by the police, nor was any demonstrated.

For Petitioner to suggest that a warrant should be required in any case in which there is police participation with private citizens at the latter's request, would do violence to the Fourth Amendment for it would then substitute the private citizens' information, which in almost all cases has nothing to do with the investigation of criminal activity, and which viewpoint totally ignores the "community caretaking" (see *Cady v. Dombrowski, infra*) circumstances that this situation generally arises in.

It is well settled that the Fourth Amendment protection against unlawful searches and seizures applies only to action by government authorities or their agents. See *Burdeau, supra;* also *Byars v. United States*, 273 U.S. 28; *Lustig v. United States*, 338 U.S. 74; *United States v. Cangiano*, 464 F. 2d 320, 413 U.S. 913; *Haerr v. United States*, 240 F. 2d 533; *Cady v. Dombrowski*, 413 U.S. 433, (acknowledging community caretaking functions on the part of the police which functions are not tantamount to the searches or other invasions of constitutional protections). The cases cited above clearly show the distinctions in circumstances that delineate what amount of police participation and under what circumstances such participation will be held to violate constitutional protections. It is apparent upon reading these cases that there is no "simple rule" that will apply in all cases, but rather the courts have enunciated guidelines that will apply after a consideration of all the facts in a particular case.

Petitioner next urges that because the Court of Appeals of Lucas County, Ohio, split two to one in their decision in this case and the Supreme Court of Ohio split five to two in their decision (petitioner erroneously states the split was four to two) that that in itself is grounds for this Court to grant the Writ of Certiorari. Again, this argument is totally without merit, as this Court most certainly cannot decide to grant a Writ of Certiorari or withhold it on the basis of how many dissenting judges there have been in the Courts below.

It is, therefore urged that the facts in the instant case do not raise an issue which is of grave importance to the public but rather is solely an issue which is of importance only to the petitioner herein. All that is presented here is an evidentiary question which has ample case law to support it and that has been discussed and decided in numerous cases, which question was decided adverse to the petitioner in the trial court and

affirmed on appeal in both the Court of Appeals and the Supreme Court of Ohio.

Respondent adopts the reasoning set forth in the majority opinion in *State v. Morris*, 42 Ohio St. 2d 307, (Appendix A in petitioner's brief) as being dispositive of the issue in this case and urges here that aside from the fact that the instant case has no grave public issue but deals with a mere evidentiary question, that the majority holding in *Morris, supra*, is in fact correct and supported by the case law as set forth by this Court. Further, the majority opinion clearly and correctly points out the faulty reasoning in the minority opinion as to the factual basis for their position.

In conclusion, it is noted that there was a companion case to the instant case tried in the United States District Court of the Southern District of New York, captioned *United States v. Capra*, 501 F. 2d 267, in footnote 4, 501 F. 2d 272 to 273, the trial court holding in the alternative that if it be assumed that the defendant had standing to attack the search ". . . that this was a private search and not subject to the Fourth Amendment. *Burdeau v. McDowell*, 256 U.S. 465, 41 S. Ct. 574, 65 L. Ed. 1048 (1921). The government did not instigate this search, *United States v. Cangiano*, 464 F. 2d 320 (2nd Cir. 1972), vacated on other grounds, 413 U.S. 913, 93 S. Ct. 3047, 37 L. Ed. 2d 1023 (1973), aff'd. 491 F. 2d 905 (2nd Cir. 1973); application for cert. pending, _____U.S._____, 94, 3223, 41 L. Ed. 2d _____; rather, it was motivated by a genuine concern on the part of railroad personnel for the safety of railroad property, fellow employees, and themselves. See *United States v. DeBerry*, 487 F. 2d 448 (2nd Cir. 1973). This concern was understandably engendered by the unusual baggage check, Ramos' nervous behavior, the weight of the suitcase, the delay in claiming it, and prior exposure, through media and personal experience, to bomb scares. Police participation was not so pervasive that the opening of the suitcase was primarily for 'the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action.' *Haerr v. United States*, 240

F. 2d 533, 535 (5th Cir. 1957). And when police are merely assisting a private party who has authority to search and a legitimate need to do so, see *United States v. Antonelli*, 434 F. 2d 335 (2nd Cir. 1970), courts are reluctant to exclude resulting evidence. *Wolf Low v. United States*, 391 F. 2d 61 (9th Cir.) cert. den., 393 U.S. 849, 89 S. Ct. 135, 21 L. Ed. 2d 119 (1968). See generally, *United States v. Blum*, 329 F. 2d 49 (2nd Cir.), cert. den., 377 U.S. 993, 84 S. Ct. 1920, 12 L. Ed. 2d 1045 (1964)." A Petition for Writ of Certiorari was denied by this Court on March 24, 1975, cited as *Capra v. United States*, 95 S. Ct.____, United States Supreme Court No. 74-659. The issue in that case was for all practical purposes identical to the issue in the instant case as the drugs that were seized and their discovery was the same as discovered in the instant case.

CONCLUSION

For the reason stated, Respondent urges that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

HARRY FRIBERG,
Prosecuting Attorney
Lucas County, Ohio

Charles J. Doneghy,
Assistant Prosecuting Attorney

Melvin L. Resnick,
Assistant Prosecuting Attorney
Lucas County Court House
Toledo, Ohio 43624
(419) 259-8720

ON BEHALF OF RESPONDENT